

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SHOSHANA HEBISHI,

Plaintiff,

-v-

Case No. 13-cv-10253

UNITED STATES OF AMERICA,  
FRONTIER AIRLINES, INC., JOHN  
BRAND, ROBERT BALL, PAUL BRUMLEY,  
MARK DEBEAU, JEREMY BOHN, PATRICK  
DRISCOLL, CHARLES JOHNSON, KEVIN  
GRANT, LIEUTENANT WASIUKANIS,  
TOYA PARKER, JOHN CARMONA, DAVID  
LAKATOS, OFFICER BRADLEY and  
NATHANIEL DEVINS,

Defendants.

-and-

MARK DEBEAU, KEVIN GRANT, TOYA  
PARKER, JOHN CARMONA, CHARLES  
JOHNSON, JEREMY BOHN, PATRICK  
DRISCOLL, LIEUTENANT WASIUKANIS  
and OFFICER BRADLEY,

Cross-Plaintiffs,

-v-

FRONTIER AIRLINES, INC.,

Cross-Defendants,

\_\_\_\_\_ /

DEFENDANTS' MOTIONS TO DISMISS, ET AL

BEFORE HONORABLE TERRENCE G. BERG

Flint, Michigan, Monday, February 10th, 2014.

1 APPEARANCES:

2 FOR THE PLAINTIFF: SARAH E. TREMONT  
3 SHELLI CALLAND  
4 1201 Pennsylvania Avenue, N.W.  
WASHINGTON, D.C. 48009

5 FOR THE PLAINTIFF: JULIE H. HURWITZ  
6 1394 East Jefferson Avenue  
Detroit, MI 48207

7 FOR THE DEFENDANTS: SARAH E. WHITMAN  
8 U.S. DEPARTMENT OF JUSTICE  
9 P.O. Box 7146  
10 Ben Franklin Station  
WASHINGTON D.C. 20044

11 FOR THE DEFENDANTS: T. JOSEPH SEWARD  
12 33900 Schoolcraft  
Suite G-1  
13 Livonia, MI 48150-1392

14 FOR THE DEFENDANTS: ALAN B. HAVIS  
15 25505 West Twelve Mile Road  
Suite 1000  
16 Southfield, MI 48034

17 FOR FRONTIER AIRLINES: BRIAN T. MAYE  
18 One North LaSalle Street  
Suite 2300  
19 Chicago, IL 60602

20  
21 David B. Yarbrough, CSR, FCRR  
22 Official Court Reporter  
(313) 410-7000

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WITNESSES:

NONE

EXHIBITS

NONE

1 Flint, Michigan

2 Monday, February 10th, 2014.

3 At or about 3:09 p.m.

4 -- --- --

5 THE CLERK OF THE COURT: All rise. Hear ye, hear ye,  
6 hear ye, the United States District Court for the Eastern  
7 District of Michigan is now in session, the Honorable Terrence  
8 G. Berg presiding. All ye having business before the Court  
9 draw nigh, give attention and ye shall be heard. God save the  
10 United States of America and this Honorable Court. You may be  
11 seated. The Court calls case number 13-10253, Shoshana Hebshi  
12 versus the United States of America, et al.

13 THE COURT: All right. Good afternoon, everyone.  
14 Let me just introduce our court reporter. Today we have  
15 Mr. David Yarbrough, thank you for your service today and we  
16 also have our law clerk, Mr. Trent Crable. Will counsel please  
17 place your appearances on the record for whoever's going to  
18 be -- well, everyone at counsel table. Why don't we do that.

19 MS. TREMONT: Sarah Tremont for the plaintiff.

20 MS. CALLAND: Shelli Calland for the plaintiff.

21 MS. HURWITZ: Good afternoon, your Honor. Julie  
22 Hurwitz for the plaintiff, your Honor.

23 MS. WHITMAN: Good afternoon, your Honor. Sarah  
24 Whitman for the individual federal defendants Robert Ball, Paul  
25 Brumley, Jonathan Brand, David Lakatos and Nathaniel Devins.

1 THE COURT: Good afternoon.

2 MR. SEWARD: Good morning -- or good afternoon, your  
3 Honor. Joe Seward on behalf the Wayne County Airport Authority  
4 defendants, Officers Bohn, Bradley, Lieutenant Wasiukanis and  
5 Captain Driscoll.

6 THE COURT: Okay, Mr. Seward.

7 MR. HAVIS: Good afternoon, your Honor. Alan Havis  
8 on behalf of the Wayne County Airport Authority defendants John  
9 Carmona, Kevin Grant, Charles Johnson, Mark DeBeau and Toya  
10 Parker. Your Honor, I may defer the oral argument to my  
11 brother counsel unless there's some specific questions about  
12 the individual defendants that I represent.

13 THE COURT: All right, thank you very much. All  
14 right, so we have two motions that we are going to consider  
15 today and I guess we should start with the motion that regards  
16 the count four, the motion to dismiss and so why don't we hear,  
17 will it be Ms. Whitman?

18 MS. WHITMAN: Yes, your Honor. Good afternoon, your  
19 Honor. May it please the Court, my name is Sarah Whitman and I  
20 represent defendants Robert Ball, John Brand, Paul Brumley,  
21 David Lakatos and Nathaniel Devins, federal officials who  
22 plaintiffs have sued in their individual capacities. Invoking  
23 the Supreme Court's decision in Bivens, plaintiff seeks money  
24 damages from the personal assets of these five individual  
25 federal defendants on a theory that they violated plaintiff's

1 Constitutional rights during a security incident at the Detroit  
2 Metropolitan Airport on September 11th, 2011, the 10th  
3 anniversary of the 911 attacks. According to the Complaint, on  
4 that day Frontier Airlines notified law enforcement of  
5 suspicious activity on one of its planes soon to be arriving in  
6 Detroit.

7 THE COURT: What time was that notification; do you  
8 know?

9 MS. WHITMAN: Approximately 3 p.m., your Honor, or  
10 just thereafter although in the Complaint I'm not sure that  
11 that time is specified.

12 THE COURT: All right. So that the initial  
13 notification from the aircraft to the ground was approximately  
14 3 p.m.? Is that right?

15 MS. WHITMAN: Or shortly thereafter, that's right.

16 THE COURT: Okay.

17 MS. WHITMAN: Frontier identified two passengers as  
18 engaging in suspicious activity in and around the plane's  
19 lavatory and reported that plaintiff may be with the two  
20 passengers. Later by telephone Frontier reported to airport  
21 police that plaintiff may be involved in the incident. Law  
22 enforcement removed all three passengers from the plane for  
23 further investigation. Plaintiff claims that she was subjected  
24 to an unlawful search and seizure and that all five federal  
25 defendants discriminated against her based on her race,

1 ethnicity or national origin in violation of the equal  
2 protection component of the Fifth Amendment. It's this last  
3 claim, the equal protection claim in count four of the  
4 Complaint, to which our motion is directed today.

5 I'm here to urge the Court to dismiss the equal  
6 protection claim the plaintiff has asserted against the five  
7 individual defendants because plaintiff has failed to allege  
8 facts sufficient to overcome defendants' defense of qualified  
9 immunity. At bottom, plaintiff has failed to plead facts that  
10 would show that any one of them acted on account of a  
11 Constitutionally protected characteristic.

12 So the doctrine of qualified immunity shields public  
13 officials like the five individual federal defendants from the  
14 necessity of defending against tort claims so long as their  
15 conduct does not violate a clearly established Constitutional  
16 right. Therefore, qualified immunity protects the individual  
17 federal defendants unless plaintiff pleads facts showing, one,  
18 that each defendant personally violated her equal protection  
19 rights and two, that the right was clearly established at the  
20 time of the defendant's conduct. If plaintiff fails to meet  
21 her burden at either step of the qualified immunity analysis,  
22 defendants are entitled to immunity and the equal protection  
23 claim should be dismissed. Here, plaintiff fails to meet her  
24 burden at both steps and I'll discuss each step in term.

25 So step one, because in Bivens' suits, plaintiff

1 seeks to recover from the personal assets of federal officials,  
2 it makes sense that the Supreme Court requires that step one  
3 for plaintiff to identify what each individual did to violate  
4 the Constitutional right at issue. What that means in practice  
5 and what the Sixth Circuit case law teaches is that plaintiff  
6 cannot survive a motion to dismiss by lumping defendants  
7 together, ascribing acts of some defendants to others or  
8 lodging conclusory allegations of misconduct against the  
9 defendants. The problem for plaintiff's equal protection claim  
10 here is that she has alleged no facts showing that any of the  
11 five individual federal defendants personally acted with a  
12 discriminatory purpose. Instead, plaintiff includes one  
13 allegation in her Complaint that supports her equal protection  
14 claim. That allegation is in paragraph 56 of the Complaint and  
15 it's also reprinted in our papers at page nine. Plaintiff  
16 states as follows: They, meaning state and federal actors,  
17 quote "acted based on the perceived ethnicity, national origin  
18 or race of Ms. Hebshi's name as they had no articulable facts  
19 connecting Ms. Hebshi to suspicion of criminal activity", end  
20 quote. In that allegation, plaintiff collectively attributes  
21 identical discriminatory intent to all five federal individual  
22 defendants along with eight other airport police.

23 Iqbal teaches that in evaluating the sufficiency of a  
24 Complaint, courts should begin by identifying the conclusory  
25 allegations because they, in the Court's words, do not suffice.

1 This lone conclusory statement in plaintiff's Complaint at  
2 paragraph 56 is conclusory. In fact, that statement of  
3 discriminatory intent is virtually indistinguishable from the  
4 conclusory allegation that the Supreme Court rejected in Iqbal.  
5 Mr. Iqbal alleged quote "defendants subjected him to harsh  
6 decisions solely on account of his religion, race or national  
7 origin for no legitimate penological purpose." That's at page  
8 580 of the Supreme Court's decision.

9 THE COURT: Right, but you don't disagree that all of  
10 the Complaint needs to be taken into account in terms of  
11 determining whether the factual allegations are sufficient,  
12 correct?

13 MS. WHITMAN: Correct. That's correct.

14 THE COURT: So this may well be conclusory language,  
15 but if, and I'm not saying that the Complaint does that here,  
16 but if the Complaint stated somewhere else that the individual  
17 defendants were acting with discriminatory intent because of  
18 the specific knowledge that they had for example, that that  
19 would be sufficient even though this is conclusory language,  
20 wouldn't it?

21 MS. WHITMAN: Sure, your Honor. The Court directs  
22 lower courts to look at the entirety of the Complaint and all  
23 of the allegations, but what my point is that in looking  
24 through the entire Complaint, this allegation is the only  
25 allegation that goes towards allegedly discriminatory conduct

1 and under Iqbal, that conclusory statement alone should not be  
2 entitled to truth, so yes, we have to then look elsewhere and  
3 see if there's any other facts to support that conclusory  
4 allegation and one other thing, not only did Iqbal reject a  
5 similarly conclusive, conclusory statement, but so did the  
6 Sixth Circuit in Rondigo. In Rondigo, plaintiff alleged quote  
7 "defendants knew that plaintiff was a woman and they took  
8 actions based on considerations other than those proper to the  
9 good-faith administration of justice." That's at page 681. So  
10 as your Honor just mentioned, we have plaintiff's lone  
11 conclusory allegation of discrimination and it's not entitled  
12 to be assumed to be true.

13 What Iqbal teaches us next to consider as you alluded  
14 to is whether plaintiff has pleaded any factual content that  
15 plausibly suggests an entitlement to relief on her equal  
16 protection claim. Iqbal explains that this is supposed to be a  
17 context-specific analysis. The problem for plaintiff again is  
18 that plaintiff's Complaint doesn't contain any factual  
19 allegations sufficient to plausibly suggest the individual  
20 federal defendant's discriminatory state of mind. Nonetheless,  
21 plaintiff asks this Court to infer discriminatory animus into  
22 each of the individual federal defendant's actions because  
23 according to her when they acted the only information they had  
24 was her name and her seat number. I have two primary --

25 THE COURT: Well, they did have that information,

1 correct? Do you concede that?

2 MS. WHITMAN: Umm, I -- the government's -- different  
3 people within the government are alleged to have received that  
4 information, but according to the facts in the Complaint,  
5 Officer Dunkin who's an officer from the Wayne County airport  
6 police received the e-mail that contains that information and a  
7 federal air marshal received that information.

8 THE COURT: An unidentified air marshal?

9 MS. WHITMAN: An unidentified air marshal.

10 THE COURT: So are you just for the sake of argument  
11 if it were the case that you had two officers whose only  
12 information was, the only information that they had was the  
13 plaintiff's name and the seat assignment, would that not be  
14 evidence that those two officers had information and were  
15 acting upon information that one could argue was discriminatory  
16 based on perceived ethnic origin?

17 MS. WHITMAN: But the problem here is that's not all  
18 the information they had.

19 THE COURT: I know, but I'm asking you just for the  
20 sake of argument if that were the case.

21 MS. WHITMAN: If we were to take that only in  
22 isolation, I think that there possibly could be an argument  
23 made, but I don't, I don't think that alone could state  
24 discriminatory intent as to those two individuals and it  
25 certainly couldn't be inferred, you couldn't infer

1 discriminatory intent as to all other federal and local  
2 officials, but --

3 THE COURT: Well, let's just say if you do have  
4 information that is information that one might consider to be  
5 ethnic background information such as someone's name and then  
6 you also had in this case the description apparently from the,  
7 umm, from the personnel on the plane of the other individuals  
8 being of possible Arab descent, if you had those two pieces of  
9 information, but then you also had other information such as  
10 conduct, would the presence of the information that pertained  
11 to their ethnic background still be considered a basis for some  
12 sort of a determination that discrimination existed even when  
13 you had other information?

14 MS. WHITMAN: No, your Honor, I don't think so and I  
15 think Avery addresses that. Although it's in dicta in a  
16 footnote, Avery posits that police often receive information  
17 whether it's from a tip or some sort of report that contains  
18 descriptive characteristics along with other identifying  
19 information and the Avery Court specifically said that happens  
20 all the time and if the tip contained information about the  
21 suspect's race along with other information and the police then  
22 investigated that suspect, that wouldn't raise any  
23 Constitutional concerns, but --

24 THE COURT: What is the other information they had?

25 MS. WHITMAN: In this case?

1 THE COURT: Yes.

2 MS. WHITMAN: So in this case, the information from  
3 the context of the Complaint is, one, it's September 11th, it's  
4 the 10th year anniversary of the 911 attacks and Frontier, an  
5 entity outside the law enforcement organization, contacted law  
6 enforcement to report suspicious activity on one of its planes  
7 while it's in flight. They identified plaintiff by name and  
8 see the number and said quote "she might also be with the two  
9 men".

10 THE COURT: Is that e-mail, has that been attached to  
11 any of the pleadings? I don't think I saw that.

12 MS. WHITMAN: It has not, your Honor.

13 THE COURT: And you say that was sent at  
14 approximately 3:00 p.m. or something?

15 MS. WHITMAN: No, that's not in the Complaint and the  
16 first notification came through around 3:00, but the Complaint  
17 doesn't talk about when the hand-over, the time of the  
18 hand-over of the e-mail to Officer Dunkin or the federal air  
19 marshal was.

20 THE COURT: Okay.

21 MS. WHITMAN: We know that plaintiff was seated next  
22 to the two men. The men were alleged to have spent lengthy  
23 periods of time in the airplane's lavatory while the other one  
24 stood outside and when the plane landed, the Frontier pilot  
25 told airport police that plaintiff quote "may also be involved

1 in the incident".

2 THE COURT: Do you know whether the Frontier employee  
3 had any factual basis for that statement that the plaintiff,  
4 Ms. Hebshi, may be with them? Do you know whether he had done  
5 any investigation such as whether they bought the tickets  
6 together or whether they, they were, had any other reason to  
7 believe that they were together when he said that?

8 MS. WHITMAN: Your Honor, we're going way outside the  
9 fact allegations of the Complaint, but regardless of what he  
10 did, the officers who are responding to the report were  
11 evaluating what they knew at the time and what they were  
12 responding to and the bottom line is that they are responding  
13 to a report from Frontier that says that there's suspicious  
14 activity on the airplane, that plaintiff may be with them and  
15 that the plane is landing imminently and so they took action to  
16 remove the passengers from the plane for investigation and we  
17 got, we touched on this a little bit earlier your Honor in your  
18 earlier questioning, but none of the five individual federal  
19 defendants are alleged to have received these communications  
20 from Frontier, either the phone call or the e-mail, but even if  
21 we were to assume that they were aware of the specific content  
22 of the e-mail and the phone call, these communications from  
23 Frontier to law enforcement don't mention plaintiff's  
24 ethnicity, national origin or name or anyone's perception about  
25 it.

1 THE COURT: Now just a second. What doesn't, what  
2 doesn't include her name?

3 MS. WHITMAN: No, it -- the -- well, number one the  
4 e-mail includes her name and her seat number.

5 THE COURT: This is the e-mail from Frontier to the  
6 aircraft, correct?

7 MS. WHITMAN: Exactly and that was handed over to  
8 Officer Dunkin and to the federal air marshal.

9 THE COURT: So Officer Dunkin and the federal air  
10 marshal had her name.

11 MS. WHITMAN: Her name.

12 THE COURT: Okay.

13 MS. WHITMAN: This call from Frontier to the Wayne  
14 County airport police officer did not contain any information  
15 about plaintiff's name, it's just her seat number, but in  
16 neither of those two communications does anyone specifically  
17 mention plaintiff's ethnicity, national origin or anyone's  
18 perception about her race, ethnicity or national origin. So in  
19 other words plaintiff's sole basis for the inference that she'd  
20 like you to draw from that one allegation in the Complaint is  
21 just not supported by the facts in the Complaint. Just to  
22 recap, the facts in the Complaint demonstrate that it, if  
23 anything, responding law enforcement officers knew more than  
24 just her name and her seat number. They knew that she had been  
25 alleged to be with them and she had been alleged to have been

1 involved in the incident and I think both, the two cases, Heyne  
2 that we cite in our brief and Rondigo, both are instructive on  
3 this point because in Rondigo, plaintiff identified a lot of  
4 facts in her Complaint and if you go through the fact section  
5 of the Court's analysis, it's quite lengthy. It details what  
6 every single individual defendant had done, but what the Court  
7 concluded was combing through all of those allegations there  
8 still was not that allegation that goes from factually neutral  
9 to factually suggestive of discriminatory intent and so in  
10 Rondigo the Court dismissed the claim on a 12(b)(6) motion and  
11 granted individual's qualified immunity.

12 Heyne parses it out more finely than that. In Heyne,  
13 we have an allegation that all of the individual federal -- I'm  
14 sorry, all of the individual defendants were alleged to have  
15 participated in a suspension decision of a student and the  
16 Court parsed out what each individual defendant was alleged to  
17 have done and determined that while there were some factually  
18 suggestive allegations of, against some of the individuals,  
19 there weren't those same kind of allegations against two of the  
20 individuals and granted their motion to dismiss and so when you  
21 parse it out here, whether or not there's allegations  
22 sufficient to infer discriminatory intent on behalf of the  
23 airline or one of its employees, that has nothing to do with  
24 the analysis here as to the five individual federal defendants  
25 for whom there is no factually suggestive allegation

1       whatsoever.

2               So Iqbal also instructs Courts to assess the  
3       plausibility of the inference that plaintiffs seek to have the  
4       Court make and the facts in the Complaint do not plausibly  
5       suggest purposeful discrimination by any of the five individual  
6       federal defendants. Instead, the facts in the Complaint  
7       support the obvious alternative explanation, that the  
8       individual federal defendants responded to investigate three  
9       passengers that an airline had included in their report and  
10      both Iqbal and Twombly and also in V.R. Entertainment which is  
11      an Eastern District of Michigan case that we cited in our  
12      brief, the courts all concluded that as between the obvious  
13      alternative explanation and the purposeful discrimination that  
14      plaintiff asks the Courts to infer, discrimination was not a  
15      plausible conclusion. As such, the claim of the plaintiffs in  
16      those cases could not survive a motion to dismiss and nor can  
17      plaintiff's claim of discrimination here.

18              Now plaintiff's failure to meet her burden at step  
19      one of the qualified immunity analysis itself warrants  
20      dismissal of her equal protection claim, but she fails at step  
21      two as well. So in the Sixth Circuit, to demonstrate that a  
22      right was clearly established for qualified immunity purposes,  
23      plaintiff must identify case law that truly dictates for every  
24      reasonable officer that what he is doing violates the equal  
25      protection clause. Plaintiff fails to meet her burden at this

1 step because she's not identified any case, let alone  
2 controlling case law, that truly compels the conclusion as the  
3 Sixth Circuit requires that what the five defendants are  
4 alleged to have done here would violate the equal protection  
5 clause. While plaintiff identifies three cases in her brief,  
6 Wren, a Supreme Court case, Avery, Sixth Circuit case and  
7 Farm Labor, a Sixth Circuit case that generally stand for the  
8 proposition that the law may not be selectively enforced based  
9 on a protected characteristic, the Supreme Court has made clear  
10 that Courts should not define the right at issue at such a  
11 generalized -- in such a generalized sense. Instead, Iqbal  
12 teaches that the question is whether the right was clearly  
13 established in a particularized sense taking into --

14 THE COURT: Well, in what sense is the right not  
15 clearly established? I mean, what are you -- what is it about  
16 arresting somebody on a plane based on ethnic background is not  
17 clearly established? I mean, that's what they're saying  
18 happened, so how is that not a clearly established right?

19 MS. WHITMAN: Because it's what the officer  
20 confronted. So here we have Wren, Avery and Farm Labor that  
21 says that the law can't be selectively enforced based on race,  
22 ethnicity or national origin so that's the general proposition,  
23 but none of those cases addressed what is alleged to have  
24 happened here which is each of those case addresses a situation  
25 in which the officer picks someone out for police action so the

1 officer scans the airport terminal and picks someone out for  
2 enforcement. In Wren, the officers choose to stop one  
3 individual on a traffic stop and chose to take action against  
4 that one individual and in Farm Labor, the same, it was also a  
5 traffic stop situation. So in all of those circumstances and  
6 in each of those cases they talk about the officer amongst a  
7 big group choosing to take action against one particular person  
8 because of their race or ethnicity, but here the situation that  
9 the five individual federal defendants confronted is they're  
10 responding to a call from outside the police organization that  
11 already identifies the individuals for investigation. So those  
12 cases that talk about the general prohibition of police  
13 selecting amongst a group doesn't apply here. The three had  
14 already been identified by Frontier and they are simply  
15 responding to that report.

16 As we talked about a little bit earlier, the closest  
17 case that even addresses the circumstances here is that  
18 footnote in Avery, footnote five and it still doesn't govern  
19 here squarely because in that dicta of footnote five, it talks  
20 about when the tip has race and some other information involved  
21 in it and as I mentioned previously, the quote unquote "tip"  
22 here didn't contain information about her race, ethnicity or  
23 national origin, but given it, be that as it may --

24 THE COURT: Well, the tip had her name.

25 MS. WHITMAN: It had her name.

1           THE COURT: Isn't that tantamount to providing  
2 information that one can ascribe some sort of ethnic  
3 characteristics to?

4           MS. WHITMAN: I don't know if a reasonable officer  
5 would know what race or ethnicity that name would suggest, but  
6 assume that there was some, that they would know that, again,  
7 Avery specifically says we find no Constitutional infirmity in  
8 that.

9           THE COURT: Well, is it fair to say that in your  
10 interpretation that whether the person's name was Bridget  
11 O'Leary or whether it was Shoshana Hebshi wouldn't have made  
12 any difference?

13           MS. WHITMAN: Exactly right, your Honor. If the law  
14 enforcement receives a call reporting suspicious activity or  
15 that someone may be involved in the activity, they're going to  
16 investigate the individuals regardless of name, regardless of  
17 seat number and the Constitutional problems that Avery saw  
18 again was, umm, they specifically said in that footnote what  
19 we're dealing with is where either a policy targets a specific  
20 race or where either by training or observation police target a  
21 particular race and that's just not the case here.

22           THE COURT: Well, let me ask you this question if I  
23 could. What about the application of the equal protection  
24 clause to the law enforcement actions that were taken in steps  
25 as we went a long here because I can see what you're saying

1 that and I can understand your argument that the information  
2 that they had to enter the plane and make the arrest was based  
3 on allegedly the involvement of this person with the people who  
4 were engaged in the more disruptive activity, that's what the  
5 claim was. After they take her into custody, they now, they  
6 have her, they have her identification, they see her, they have  
7 her name. How is it that subsequent acts by law enforcement  
8 after that point are not also subject to an equal protection  
9 claim?

10 MS. WHITMAN: Well, so law enforcement in general is  
11 conducting the investigation at that point, but let's talk  
12 about just the individual federal defendants that are, whose  
13 conduct is at issue in my motion. So none of the individual  
14 federal defendant are alleged to have interacted with  
15 plaintiff. The defendants Ball, Brand -- sorry, Ball, Lakatos  
16 and Devins are simply alleged to have been at the inspection  
17 site and quote "participated in a decision". Paul Brum --

18 THE COURT: Well, now wait a second. You're saying  
19 that the FBI was not involved in the decisions that were made  
20 as to whether or not to hold her or whether or not to search  
21 her?

22 MS. WHITMAN: The three defendants that I just  
23 mentioned are Robert Ball who is the federal security director  
24 and Officers Lakatos and Devins who are CBP officers and so  
25 they're alleged to have just responded to the site and are

1 alleged to have participated in the decision to detain her. So  
2 that's still at that initial stage that you're talking about,  
3 your Honor. Paul Brumley who is an ICE special agent is  
4 alleged to have been part of the team that boarded the plane  
5 and so we're still talking about that initial, umm, first  
6 actions as part of the investigation and so then that leaves  
7 FBI Special Agent Brand who is alleged to have discussed with  
8 Wayne County airport police officer whether to strip search the  
9 three passengers and then to have released her and so at best  
10 under your analysis the first four are still in those initial  
11 stages, but nevertheless those actions, those alleged actions  
12 of FBI Special Agent Brand are part of the investigation. They  
13 are still factually-neutral allegations and there's nothing in  
14 the Complaint to suggest that those actions were taken with a  
15 discriminatory intent. There's just none in there. If you  
16 comb the Complaint, there's nothing to suggest anything about  
17 Agent Brand's motive or intent. So if I may just --

18 THE COURT: Well, wouldn't discovery be helpful on  
19 that point? I mean, wouldn't the bureau have developed all  
20 sorts of information about these individuals in the time that  
21 they had them during these two hours that they were in their  
22 custody after the initial arrest?

23 MS. WHITMAN: Your Honor, that's the same argument  
24 that plaintiffs in Marcilis and plaintiffs in Iqbal made and  
25 Iqbal was clear; quote, "Rule Eight does not unlock the doors

1 of discovery for a plaintiff armed with nothing more than  
2 conclusions". New Albany Tractor, Sixth Circuit recent case  
3 interpreting Twombly and Iqbal specifically says, quote:

4 "The plaintiff may not use the discovery  
5 process to obtain facts after filing suit.  
6 The language of Iqbal specifically directs  
7 that no discovery may be conducted in cases  
8 such as this even when the information to  
9 establish a claim is solely within the  
10 purview of the defendants."

11 So what Twombly changed was under Conley v. Gibson,  
12 the no set of facts standard, wholly conclusory statements of a  
13 claim could survive a motion to dismiss and plaintiffs could  
14 uncover more facts if the pleadings left open the possibility  
15 that a plaintiff might be able to establish facts and Iqbal and  
16 Twombly instead said Courts need to assess the facts that are  
17 in the Complaint to determine whether they sufficiently allege  
18 a plausible claim and here plaintiff fails on this front.

19 So to close, the doctrine of qualified immunity was  
20 developed to ensure that only personal conduct, conduct that  
21 unquestionably violates the Constitution, will subject an  
22 official to individual liability. Here, plaintiff simply has  
23 not alleged any facts that would show that each of these five  
24 individual federal defendants violated her clearly established  
25 equal protection rights so count four should be dismissed.

1 Thank you, your Honor.

2 THE COURT: All right, thank you very much. Now I  
3 know that we also have the airport officers who are responding  
4 or are rather a part of this motion filing a separate motion so  
5 I'll hear from Mr. Seward.

6 MR. SEWARD: Well, thank you, your Honor. Joe Seward  
7 on behalf of the Wayne County officers. I listened to some of  
8 the questions this Court asked and you asked a question if only  
9 the facts of the case were her name and a seat assignment,  
10 could that show evidence of a discriminatory intent and, but  
11 that's not the allegations in the Complaint. I think that's  
12 the important part of what we're trying to point out to the  
13 Court because if you look at beginning at page or paragraph 45  
14 of the Complaint.

15 THE COURT: Okay.

16 MR. SEWARD: She alleges that some of the flight  
17 attendants and passengers became suspicious. So that starts  
18 the ball going.

19 THE COURT: Yeah.

20 MR. SEWARD: She then goes on to allege that at  
21 paragraph 49 that an e-mail is sent, essentially an e-mail is  
22 sent from Captain Pucci saying, you know, we have some  
23 suspicious activity here, we have flight attendants and  
24 passengers concerned and then that is sent to Frontier and then  
25 she ads at paragraph 49 that Mr. Fraley, a Frontier employee,

1 says, the Complaint alleges that he, the Frontier person, added  
2 the name of the passenger in 12A, Ms. Hebshi and again  
3 plaintiff's factual allegation is that Fraley commented that  
4 she may be with the two men. So now we have a call for help  
5 from Frontier Airlines informing law enforcement of a situation  
6 that raised the concerns of flight attendants, passengers,  
7 communicated that to the captain who then relays it to Frontier  
8 who then according to paragraph 49, Mr. Fraley adds and may be  
9 with them. So under that scenario, the mere fact of her name  
10 is not the allegation in the Complaint, the allegation in the  
11 Complaint is the comment she may be with them. So when you  
12 look at, you know, the doctrine of qualified immunity, would an  
13 officer know that it's wrong to do no investigative response to  
14 that message? And that's, while we may say that the parameters  
15 of the Fourth Amendment generally are well established, but the  
16 Court has to look at the actual underlying facts, you know.

17 THE COURT: And how do you respond to the question  
18 that I was asking Ms. Whitman previously which is let's say  
19 that for the sake of argument that because the initial report  
20 included information that linked Ms. Hebshi with the others and  
21 that the decision to arrest them and remove them from the plane  
22 was based on that totality of circumstances and even further,  
23 again just for the sake of argument, that that alone was not  
24 sufficiently discriminatory, that there wasn't proof of  
25 discriminatory animus. How do you address the question as to

1 whether or not there could be actions taken by law enforcement  
2 after that point where they are acting upon, no longer only  
3 acting upon that initial information, but they're making  
4 decisions to hold them for a certain amount of time, to conduct  
5 a particularly invasive search, to interview them, et cetera,  
6 these decisions are separate. Could there be an argument that  
7 at that point any of those decisions or all those actions were  
8 arguably an equal protection violation? Can that be separated  
9 is my question.

10 MR. SEWARD: Yes and I understand it 'cause the Court  
11 mentioned and I wrote down can we look at the steps along the  
12 way and the answer to that question, again, we have to be  
13 focused on the allegations in the Complaint. So if you take a  
14 look at the allegations of the Complaint, the e-mail is only  
15 seen by three Wayne County persons, Driscoll, Carmona and  
16 Johnson and a decision is made to handcuff her and take her  
17 off. So that's if we want to look at steps, that's one step.  
18 What I would submit given the number of Wayne County airport  
19 persons that are involved up until this point, these are the  
20 only three that plaintiff alleges has knowledge of this e-mail,  
21 otherwise there's no allegation that like DeBeau knew, Grant  
22 knew of the name of the person. So now once we get there, a  
23 decision is made to handcuff and remove her and that's alleged  
24 to be Carmona. I would submit at that step it still has not  
25 clearly established that that call for help from Frontier

1 establishes that we violated clearly, clearly established law.

2           So then we have to look at the next event that  
3 plaintiff alleges which is that one of the officers, Bradley,  
4 it's at paragraph 78 of the Complaint, took her in the back  
5 seat of his car and transported her from the airplane to the  
6 police station, building 358. Again, looking at Bradley's only  
7 involvement as alleged in the Complaint, he's taking somebody,  
8 transporting someone from a scene to a more secure, safe, let's  
9 do the investigation. I would submit to the Court that at that  
10 point there still is not a violation of clearly established  
11 law.

12           Then I would point out now we have her at the station  
13 and interesting, plaintiff points out in her brief that Toya  
14 Parker who allegedly performed the search is not a part of the  
15 equal protection claim. So that leaves the only other person  
16 left is Wasiukanis and plaintiff does allege that supposedly  
17 his, umm, her appearance may have played a role in the decision  
18 although she doesn't specify exactly what it's a conclusion,  
19 but let's presume that she's saying well Wasiukanis made a  
20 decision based on ethnicity, here's the problem with that.  
21 First of all --

22           THE COURT: Are you saying that Lieutenant Wasiukanis  
23 indicated that the decision was made based on ethnicity?

24           MR. SEWARD: No, no. The allegations as to  
25 Wasiukanis are at 85 and it says at approximately 4:40 p.m.,

1     Wasiukanis conferred with FBI Agent John Brand and they decided  
2     that the three passengers including Ms. Hebshi should be strip  
3     searched. Now the -- 'cause the Court brought up an  
4     interesting comment, well, we're focusing only on the  
5     conclusion in count four which says that the equal protection,  
6     there was a protection claim, don't you have to look at the  
7     underlying facts? Absolutely, so that's why I'm focusing on  
8     these facts because when you look at the allegation in the  
9     Complaint, I think it's 134, it just says that these acts were  
10    done because of her last name or her appearance. Well, that's  
11    why I'm focusing on the specific acts of the Wayne County  
12    Airport Authority. So if we look at Wasiukanis, nowhere is  
13    there an allegation, a factual allegation that, A, he saw the  
14    e-mail. Plaintiff is quite specific as to who saw the e-mail  
15    from Frontier and she only mentions three. Second of all,  
16    nowhere does she allege that Wasiukanis saw Ms. Hebshi and that  
17    based upon her appearance made that decision and I would submit  
18    to the Court even if that allegation were somehow to come  
19    forward in an amended Complaint, I would submit to the Court  
20    that even that allegation as to Wasiukanis would not bring this  
21    case out of the protections afforded by the qualified immunity  
22    because she would have to show that someone who's arrested,  
23    someone who -- strike that, someone who was taken into custody,  
24    someone who's suspected of being involved in a plot to blow up  
25    the plane because she does make allegation, I think it's 76 she

1 was asked do you have any explosives on you, would that person  
2 know that strip-searching someone would violate the  
3 Constitution and I submit not particularly when you look at how  
4 the Supreme Court handled the Iqbal decision 'cause it  
5 focused -- it left aside the excessive force claims, they  
6 looked at the policy of taking certain people of certain  
7 descent into custody and the underlying theme to that case is,  
8 you know, since September 11th, 2001, our lives changed and law  
9 enforcement changed, so --

10 THE COURT: Well, hold on a minute. Don't go there.  
11 Constitution didn't change, equal protection didn't change,  
12 Fourth Amendment didn't change, we all know it was September  
13 11th. Move on.

14 MR. SEWARD: Well, your Honor, I, I --

15 THE COURT: Move on, please.

16 MR. SEWARD: Okay. I would submit to the Court that  
17 knowing when and when not to conduct a strip search given the  
18 situation presented here, there are no cases that talk about  
19 that that is wrong, that there's no law that they can point to,  
20 they haven't even brought it up in their Complaint or their  
21 brief. They don't separate out what Wasiukanis did. They  
22 don't cite any case that says you know, the law says you cannot  
23 do that. So absent that, then that triggers the qualified  
24 immunity argument that entitles even Wasiukanis a dismissal.  
25 Those are my arguments.

1           THE COURT: All right. Thank you very much,  
2 Mr. Seward. Okay, on behalf of plaintiff and is it Ms.  
3 Goodman? I'm sorry --

4           MS. TREMONT: No, Ms. Tremont.

5           THE COURT: Ms. Tremont, okay, sorry about that. I  
6 didn't have your name correctly written down. Okay, you may  
7 proceed. We have a podium that can go up and down.

8           MS. TREMONT: Your Honor, may it please the Court, on  
9 September 11th, 2011, the plaintiff here, Shoshana Hebshi,  
10 underwent a terrible and inexcusable ordeal. On that day, Ms.  
11 Hebshi who is a freelance journalist, a mother of two young  
12 twins was traveling home from a visit to her sister in  
13 California. In Denver, she boarded a Frontier Airlines flight  
14 to her final destination which was Detroit Metro Airport. From  
15 Ms. Hebshi's perspective, that flight was pretty uneventful.  
16 She remained in her seat the entire time. She passed the time  
17 by sleeping and playing games so she was surprised when the  
18 plane landed, it was diverted to an area of the airport away  
19 from the gates and surrounded by law enforcement vehicles.  
20 That surprise turned to shock and fear when several  
21 heavily-armed law enforcement officers stormed the plane, ran  
22 up the aisle and stopped at her seat and asked her to get up  
23 and come with them. She asked what was going on and received  
24 no answer. Instead, she was handcuffed, forced off the plane,  
25 then once outside thrown against the police car and pat

1 searched all in full view the passengers still on the plane.  
2 She was then placed in a police car, transported to a detention  
3 facility and locked in a cell. All the time her repeated  
4 requests about why this is happening and what was going on went  
5 unanswered.

6 After she had been in that cell for a whole hour, she  
7 was then strip searched. She was strip searched in an invasive  
8 and degrading manner. She was forced to remove all of her  
9 clothing so she was completely naked, then in view of an  
10 officer, she was instructed to bend over and cough. That  
11 officer ran her fingers through Ms. Hebshi's hair, looked in  
12 her mouth, looked under her eyelids while all the time Ms.  
13 Hebshi was crying because she was so frightened. After all of  
14 this, it was still a few more hours before Ms. Hebshi was  
15 finally released after an interrogation with an admission from  
16 the FBI that she was not involved in any suspicious conduct.

17 THE COURT: Do you know approximately the timeline  
18 here? I know the plane landed at approximately 3:30 and I  
19 think that Ms. Hebshi was released at approximately 7:30; is  
20 that right?

21 MS. TREMONT: Yes, your Honor.

22 THE COURT: And then approximately what time did the  
23 strip search occur; do you know?

24 MS. TREMONT: The strip search occurred approximately  
25 one hour after Ms. Hebshi was taken into custody so I

1 believe --

2 THE COURT: So approximately 4:30?

3 MS. TREMONT: Right.

4 THE COURT: And then she was interviewed as well,  
5 correct?

6 MS. TREMONT: That's right.

7 THE COURT: And about what time did that happen?

8 MS. TREMONT: It was about two hours after the strip  
9 search.

10 THE COURT: About 5:30? No, after -- no, about 6:30  
11 if you say the strip search occurred at 4:30?

12 MS. TREMONT: Yes, that's right and then there was  
13 about an hour that elapsed from the time of the interrogation  
14 until when she was released.

15 THE COURT: And about how long did the questioning  
16 period last, about?

17 MS. TREMONT: The interview lasted about half an  
18 hour. Your Honor, the facts alleged in the Complaint plausibly  
19 show that Ms. Hebshi was subjected to this treatment for one  
20 reason and that was because of her Middle Eastern name and  
21 these facts are enough to overcome defendant's qualified  
22 immunity defense at this early stage of the litigation.

23 Defendants point or allege that we have brought only  
24 one allegation of discriminatory intent, however it's clearly  
25 established in the law that we must look at the Complaint as a

1 whole when assessing whether a claim has been made and the  
2 facts that are alleged there do make plausible the inference  
3 that the defendants who arrested, detained and strip searched  
4 Ms. Hebshi were acting with a discriminatory motive. On pages  
5 eight through 10 of our brief, we have broken down the specific  
6 acts that each defendant is alleged to have taken with respect  
7 to Ms. Hebshi's arrest, detention and strip searched. We have  
8 very clearly put each of these defendants on notice of the  
9 specific actions that they took with respect to Ms. Hebshi and  
10 which violated her Constitutional rights.

11 THE COURT: Well, I, I agree that you have clearly  
12 detailed the specific acts and identified which defendant you  
13 are claiming was responsible for which acts, but my question is  
14 can you identify as to any of the defendants what you, what you  
15 are alleging as a fact showed that any of the defendants were  
16 motivated by the knowledge of Ms. Hebshi's name? I mean,  
17 you've just said that that was the reason. What fact do you  
18 have that supports that?

19 MS. TREMONT: The information that the defendants  
20 received from Frontier Airlines, this was e-mail from  
21 Mr. Fraley, very clearly showed that Ms. Hebshi was lumped into  
22 this report of suspicious behavior solely because she had a  
23 Middle Eastern name. If you look that e-mail, what you see is  
24 the report that came in from the captain of the plane which  
25 identified two passengers in seats 12B and 12C, those were the

1 two men seated next to Ms. Hebshi as allegedly acting  
2 suspiciously on the plane because they had been going to the  
3 restroom for too long a period of time and passengers were  
4 getting nervous. Then within that same e-mail you can see a  
5 communication from a Frontier employee who is on the ground not  
6 involved in the plane who reports in seat 12B and 12C, here are  
7 the names of those two individuals, they are very clearly names  
8 that are of foreign ethnicity and then it says by the way, in  
9 seat 12A is this passenger Shoshana Hebshi who may also be with  
10 them. It's clear from the face of that communication that the  
11 only information known about Ms. Hebshi was that she had that  
12 name and that was what was passed on to law enforcement  
13 officers.

14 THE COURT: But don't you agree that at a minimum if  
15 that's the case, then only those law enforcement officers that  
16 you can reasonably allege knew that information would be even  
17 in a position to use it in making a decision as to what they  
18 were doing, correct?

19 MS. TREMONT: Your Honor, we're entitled to a  
20 reasonable presumption at the pleadings stage that the  
21 information known to law enforcement officers collectively was  
22 known to each law enforcement officer individually. The facts  
23 that we have here is in addition, law enforcement officers have  
24 a Constitutional duty to verify the reliability of a tip that  
25 comes in from any individual and what we have here is a

1 situation where law enforcement officers received a tip that  
2 contained very bare bones, conclusory assertions from lay  
3 individuals that Ms. Hebshi was quote "might be involved in  
4 this activity" or may be with the two other passengers who were  
5 allegedly suspicious and that alone, it's not plausible that  
6 that was the basis for Frontier taking this action. When we  
7 look at that, we say law enforcement officers had a duty to  
8 ascertain themselves that reasonable basis for taking the  
9 extensive law enforcement response against Ms. Hebshi must be  
10 found and the fact that the law enforcement officers didn't ask  
11 Frontier or the individual that sent this report what exactly  
12 they had done to make, to do any sort of fact investigation  
13 that Ms. Hebshi was actually involved in these suspicious  
14 conduct, the fact that they themselves did not take a few  
15 minutes to run a criminal background check or even do a Google  
16 search to try and figure out how she was --

17 THE COURT: Now do you know that? You're saying that  
18 now in your argument, but do you know that law enforcement did  
19 not take those steps based on any discovery or anything you've  
20 done?

21 MS. TREMONT: We have some, received some documents  
22 from a public records request to the Wayne County Airport  
23 Authority and there is no indication that any sort of  
24 investigatory work was done aside from reviewing these e-mails  
25 and that's the facts as they are alleged in the Complaint. We

1 have specific allegations that no additional steps were taken  
2 after the law enforcement defendants received this information.

3 THE COURT: Now according to what, I believe what the  
4 government alleged just now that there was not a lot of time  
5 between the initial contact from the aircraft to the ground and  
6 the landing, is that your understanding as well?

7 MS. TREMONT: Your Honor, no. It's our understanding  
8 that more than an hour passed from the time that the first  
9 reports of suspicious activity came in to law enforcement and  
10 the plane actually landed on the ground.

11 THE COURT: More than an hour that would have  
12 included the names of the suspicious actors?

13 MS. TREMONT: The information that we have and as  
14 alleged in the Complaint is that the initial reports of  
15 actually from passengers on the plane to flight crew on the  
16 plane about the two men who are allegedly acting suspiciously  
17 happened shortly before 3:00 p.m. and we also know that by  
18 around 3:00 p.m., so very shortly thereafter was when various  
19 individuals started gathering at the inspection site and  
20 preparing for the arrival of the plane. So as alleged in the  
21 Complaint, there was only a very short window between when  
22 passengers on the plane initially started alleging suspicious  
23 conduct to when that got transmitted to law enforcement 'cause  
24 they already were --

25 THE COURT: So there really wasn't that much time

1 between 3:00 p.m. and 3:30 when the plane landed from what  
2 you're telling me. There wasn't -- you said an hour, it's  
3 really a half an hour between the time when this information  
4 would have been communicated and the time that the plane  
5 landed. Is that right?

6 MS. TREMONT: Your Honor, I think that you are  
7 correct, but even if it's half an hour, that is still, we're  
8 talking about very simple questions that could have been asked  
9 when the individuals had the pilot on the phone or throughout  
10 the numerous other channels that would have taken mere minutes  
11 to ascertain exactly what was going on here. In addition we  
12 know that once Ms. Hebshi was taken into custody, even more  
13 time elapsed between the time that she was arrested and strip  
14 searched and then again between the time she was strip searched  
15 and ultimately released so we're talking about over all several  
16 hours that she was in custody where no additional action was  
17 taken in a timely manner.

18 THE COURT: Again at this point you're just, I assume  
19 that you're making that as an allegation when you say no  
20 additional action was taken. You haven't really done discovery  
21 to know for instance whether background checks or database  
22 searches or anything else was done regarding these individuals  
23 from the time that they were arrested until the time they were  
24 released.

25 MS. TREMONT: Well that's correct, your Honor. I

1 mean, we're still at the pleading stage here.

2 THE COURT: At this point you don't know for sure.

3 MS. TREMONT: That's correct.

4 THE COURT: Okay, go ahead.

5 MS. TREMONT: So in addition to the fact that the  
6 only concrete information about Ms. Hebshi herself as known to  
7 law enforcement was her Middle Eastern name, there's also the  
8 other allegations in the Complaint that point to a  
9 discriminatory intent. Namely, at paragraph 47, we allege that  
10 initial reports of suspicious activity on the plane indicated  
11 that the men involved were possibly of Arab descent. We also  
12 know from paragraph 82 that Ms. Hebshi when she was taken into  
13 custody was asked if she spoke English. These taken with again  
14 the fact that law enforcement officers were seemingly acting  
15 only based on her Middle Eastern name indicate that there was a  
16 discriminatory intent here and make that, our equal protection  
17 claim plausible under Iqbal.

18 Also your Honor, the standard here is only that we  
19 prove that a discriminatory intent is plausible. We don't have  
20 to prove that there aren't any other plausible allegations. We  
21 don't even have to prove that our explanation here is more  
22 plausible than what defendants posit. We only have to prove  
23 that this is a plausible version of events. Defendants point  
24 to the fact that Frontier had reported suspicious conduct on  
25 the plane as itself a discrete fact that motivated their

1     conduct, but again we only have as alleged in the Complaint two  
2     reports from Frontier and these are bare bones and conclusory.  
3     It's only assessments from, again, lay individuals with no law  
4     enforcement expertise or background basically alleging that Ms.  
5     Hebshi was suspicious, that she may be involved, that she may  
6     be with these two men and we know from Mr. Fraley's e-mail  
7     which was information available to law enforcement officers  
8     that this suspicion or may be assertions were because of Ms.  
9     Hebshi's name. As for --

10           THE COURT: Well, do we really know that? I mean, I  
11     can see why you might infer that based on the evidence that you  
12     have because apparently although I asked the question, but  
13     nobody seemed to know whether the Frontier person had done any  
14     checking on the people in 12B and C and A to see whether they  
15     had any kind of pattern of similar conduct in buying their  
16     tickets or traveling together or even getting on the same plane  
17     in Denver or whatever, nobody seems to know that at this point,  
18     but you don't really know that the, that he said that they were  
19     together simply because of her name, right? You're just,  
20     you're inferring that.

21           MS. TREMONT: We'd argue that it's clear from the  
22     face of the report that was given to law enforcement officers  
23     that that was the only basis for him lumping them together. I  
24     mean, he offers no facts to support that conclusion and frankly  
25     law enforcement officers didn't ask him or anyone at Frontier

1 the basis for making this allegation and that leads to a  
2 reasonable inference that they didn't think more facts were  
3 necessary because in and of itself the fact that she has this  
4 Middle Eastern name and is allegedly involved with two other  
5 people with foreign names was enough to initiate this massive  
6 law enforcement response against her.

7 Defendants also allege that there's, we have made  
8 insufficient allegations that they could have formed a  
9 perception of Ms. Hebshi's race or ethnicity based only on her  
10 name, however it's clear just from what her name is that it's  
11 of a foreign ethnicity and we have alleged discrimination on  
12 the basis of race, ethnicity or national origin. The fact that  
13 we do not specifically allege that defendants believed her to  
14 be of Middle Eastern origin because of her name does not defeat  
15 our claim. It is clear that her name is of a foreign ethnicity  
16 and that is enough to state an equal protection violation.

17 THE COURT: How do you respond to the argument based  
18 on the Avery case that this is a situation where the reference  
19 to the ethnic background or the reference to the name that was  
20 arguably an ethnic name came from the tip from the airline, not  
21 from law enforcement and so that they under Avery would be  
22 allowed to respond to a tip provided that it had some, some  
23 basis of alleged criminal activity going along with a  
24 description that may involve an ethnic or racial description?

25 MS. TREMONT: Right, so law enforcement officers have

1 a Constitutional duty to make sure that they're responding to  
2 tips that are reliable. They can't just insulate themselves  
3 from their Constitutional responsibilities by claiming that  
4 they were relying on a tip. If I called 911 right now and said  
5 there's a person standing on the street corner, he's black,  
6 he's suspicious, law enforcement officers who responded to that  
7 tip, that's not -- would not be immune from an equal protection  
8 violation because it's clear that the tip is based on the fact  
9 only of the informant's perceptions about race or ethnicity and  
10 that's exactly what we have here. We have a tip that's based  
11 on impermissible characteristics of an individual and not on  
12 any discrete facts about her conduct or anything that she was  
13 doing on that plane. And I would again, the other half of that  
14 footnote in Avery explicitly says, you know, for example law  
15 enforcement officers cannot look at a flight manifest and pick  
16 out individuals with ethnic surnames to search or initiate  
17 investigation against and essentially that's really what we  
18 have here. We have a person albeit from Frontier who's looking  
19 at a flight manifest and singling out some one for a law  
20 enforcement action based only on her ethnic surname and law  
21 enforcement officers had information, had that information and  
22 knew that's what they were doing and yet acted anyway. And  
23 also to counsel's point that it's reasonable for law  
24 enforcement officers to be responding to tips like this,  
25 response is not equal to arresting, putting in handcuffs, pat

1 searching, detaining for several hours, strip searching. There  
2 is proportionality involved here and the fact that Frontier  
3 made these conclusory and baseless allegations against Ms.  
4 Hebshi do not justify the extreme response that happened in  
5 this particular instance.

6 I'd also like to talk briefly about Iqbal just to  
7 point out that even under those pleadings standards, we have  
8 met the requirement of stating a plausible claim for relief.  
9 In that case, we had a vastly different circumstance than what  
10 we had here. The only petitioners that were before the Supreme  
11 Court in that case were the Attorney General of the United  
12 States and the director of the FBI and their only alleged  
13 misconduct in that case was developing and implementing a  
14 policy that somewhere down the road led to that plaintiff's  
15 arrest -- excuse me, detention as a person of high interest in  
16 the wake of September 11. Because the two defendants before  
17 the Court in that case were so removed from the discrete  
18 actions taken against that individual plaintiff, his arrest,  
19 his detention under harsh conditions made it implausible that  
20 any sort of discriminatory motive against that individual  
21 plaintiff had driven the attorney general's and FBI director's  
22 decision to implement a policy at the very upper levels of law  
23 enforcement, however also in Iqbal the Court explicitly stated  
24 that that plaintiff might have an equal protection claim  
25 against the individuals who had detained him under harsh

1 conditions and explicitly noted that those individuals were not  
2 before the Court in that case. What we have in Ms. Hebshi's  
3 case are claims against exactly those types of individuals that  
4 were responsible for her arrest, for her detention and her  
5 strip search and given that this all happens, you know, on one  
6 discrete flight on one discrete day, it is plausible that they  
7 had the information that Frontier was reporting the tip only  
8 because of her name because, and that she was caught up in  
9 these reports of suspicious conduct only because of her name,  
10 that becomes plausible because these individual people were the  
11 relevant actors that were initiating action against Ms. Hebshi.

12 Really, what Iqbal confirms is nothing more than the  
13 age old principle that Bivens and Section 1983 actions cannot  
14 be stated through a theory of vicarious liability and that's  
15 not the case that we have before us today. I'd also drawing  
16 distinction between this case and Rondigo. There, the only  
17 plausible explanation for defendant's actions was  
18 nondiscriminatory treatment of that individual plaintiff and  
19 her business. Also I'd point out that in that case, the Court  
20 was operating under a different standard; namely, they found  
21 that merely alleging that the plaintiff was a woman-owned  
22 business did not state an equal protection claim which would  
23 would agree with and we would point to the fact that we have  
24 far more allegations here that point to discriminatory  
25 treatment, but then the Court was working on a standard of a

1 class of one or class of one equal protection claim which is  
2 different in that it requires proof that the defendant's  
3 alleged explanations for the treatment were not plausible. So  
4 the Court could look at the Complaint as a whole and determine  
5 whether or not those proffered explanations from defendants  
6 were plausible and that would take care of her claim. That's  
7 not the standard that we're operating under here. Here we have  
8 again the specific evidence that plaintiff was singled out for  
9 law enforcement action because of her name and as well as the  
10 other evidence that again other reports of suspicious conduct  
11 associated with this incident were attributed to people of  
12 possibly Arab descent and that Ms. Hebshi herself was asked if  
13 she spoke English when she was brought into custody.

14 Your Honor, we also meet the second prong of the  
15 qualified immunity analysis which was that Ms. Hebshi's right  
16 to not be singled out for law enforcement action because of her  
17 race, ethnicity or national origin was clearly established. We  
18 don't need a case that is directly on point in order for a  
19 right to be clearly established. The existing case law only  
20 has to give officers reasonable notice that their actions were  
21 unconstitutional and here, there is many cases that establish  
22 that it's illegitimate to initiate law enforcement action  
23 against an individual solely because of their name. We would  
24 point to the Farm Labor Organizing Committee case cited in our  
25 brief that an equal protection violation in the law enforcement

1 context occurs whenever actions are taken against someone that  
2 are motivated at least in part because of their race. Also  
3 we've already discussed the Avery case, but that again shows  
4 that you can't single someone out for investigation because of  
5 their ethnic surname and the fact of the matter is that because  
6 law enforcement officers were relying on a tip allegedly,  
7 that's defendant's position, that doesn't take away the fact  
8 that they had the Constitutional duty to make sure that tip was  
9 justified and the fact that they didn't do that in this case,  
10 that they didn't look through and find articulable facts  
11 linking Ms. Hebshi to suspicious conduct or otherwise that  
12 would provide a basis to detain her, gives rise to a plausible  
13 inference that they thought the information they did have  
14 available to them, her Middle Eastern name, was enough to  
15 detain her and strip search her and arrest her.

16 Defendants also pointed to the fact that the incident  
17 took place on the 10th anniversary of September 11th and of  
18 course we know that this is a significant date in our nation's  
19 history, but law enforcement officers on that date should have  
20 been aware of and attuned to the fact that because of its  
21 significance, allegations of suspicious conduct that were  
22 mistaken or baseless were especially likely to occur given the  
23 sensitivities of that date. Here, Ms. Hebshi has pleaded facts  
24 that each defendant was personally involved in her arrest,  
25 detention or strip search and facts that make Ms. Hebshi's

1 allegation of discriminatory intent plausible because again the  
2 Complaint shows that defendants only -- the only information  
3 defendants had access to about Ms. Hebshi was her Middle  
4 Eastern name, there are no other facts to justify her arrest,  
5 detention or strip search and we also know that initial reports  
6 of suspicious conduct were attributed to people of possibly  
7 Arab descent. We also know Ms. Hebshi was asked if she spoke  
8 English. At this early stage of the litigation before we have  
9 received or we've conducted any discovery, we do not need to  
10 plead nor to survive a claim of motion -- a claim of qualified  
11 immunity on a motion to dismiss. In the alternative, we would  
12 also ask for leave to amend the Complaint if it is found that  
13 our allegations are insufficient and unless you have more  
14 questions, your Honor?

15 THE COURT: Thank you, Ms. Tremont. All right, is  
16 there any response?

17 MS. WHITMAN: I'd like to make a brief statement,  
18 your Honor.

19 THE COURT: I'm sorry?

20 MS. WHITMAN: I'd like to make a brief statement,  
21 your Honor.

22 THE COURT: Yes.

23 MS. WHITMAN: Just a couple of rebuttal points, your  
24 Honor. You spent quite a few minutes speaking with Mr. Seward  
25 about some of the allegations that go to the Fourth Amendment

1 search, unlawful search and seizure claims and Ms. Tremont  
2 discussed at length the allegations that they have in the  
3 Complaint about whether there was a sufficient investigation,  
4 how quickly that investigation unfolded and other positions of  
5 plaintiff in terms of the manner in which the investigation was  
6 conducted. This motion is not about her Fourth Amendment  
7 claims for unlawful search and unlawful seizure. This motion  
8 to dismiss only applies to her equal protection claim and so in  
9 order to assess whether she's alleged sufficient facts, we need  
10 to look to the Complaint to see if there's any factually  
11 suggestive allegations about the individual federal defendant's  
12 discriminatory intent and there are none.

13 Let's just assume for a moment that plaintiff's  
14 allegation which is on information and belief that law  
15 enforcement failed to investigate in those moments between  
16 first call and landing, let's just assume that's true. That  
17 alleged failure to investigate could have been for all sorts of  
18 reasons. Could have been a mistake. It could have been  
19 because other people were doing it besides the actual  
20 defendants, they thought someone else was doing it, they didn't  
21 have enough time, they thought they had enough. None of that  
22 goes to whether law enforcement was acting based on a  
23 constitutionally protected characteristics. Plaintiff's Fourth  
24 Amendment claims are going forward as to the individual federal  
25 defendants. What's at issue is just her equal protection claim

1 and there are just no facts in the Complaint to infer  
2 discriminatory intent.

3 I also wanted to respond briefly because there was a  
4 lot of discussion with the plaintiff's attorney about what  
5 Mr. Fraley did and why he may have done it and what was  
6 happening on the plane. That all goes to Frontier's actions  
7 and our motion is about what plaintiff alleges the five  
8 individual federal defendants knew and did allegedly.

9 As to step two, we agree with plaintiffs that they  
10 don't need to find one case that's specifically on point to  
11 show that a right is clearly established, but they do need to  
12 identify controlling authority for the proposition that's at  
13 issue here and Ms. Tremont points out the Farm Labor case which  
14 is interesting because again as I mentioned in my opening  
15 remarks, Farm Labor is a case in which a specific state trooper  
16 targeted someone for action out of a bigger group, it wasn't a  
17 tip situation. Moreover, in Farm Labor, the standard that the  
18 Sixth Circuit required plaintiff to prove was not only  
19 discriminatory purpose, but discriminatory affect and on page  
20 534 and 535, listed a whole series of cases from across the  
21 nation that required those two prongs.

22 Finally about Avery, Ms. Tremont used the footnote  
23 from Avery to talk about using a flight manifest and selecting  
24 names based on -- selecting people based on ethnic surnames and  
25 as is clear from the Complaint here, no individual federal

1 defendant is alleged to have selected anybody. They're simply  
2 responding to a call from Frontier that identified plaintiff as  
3 that she may be with them or may be involved in the conduct and  
4 they took steps to conduct an investigation to determine  
5 whether or not that was true. I think Mr. Seward is also going  
6 to add a few additional points unless your Honor has any  
7 specific questions for me.

8 THE COURT: No, thank you very much.

9 MS. WHITMAN: Thank you, your Honor.

10 MR. SEWARD: I guess that's my lead-in. There is one  
11 comment that we raised in our reply brief, but I'd like just to  
12 touch upon it and that is that Ms. Tremont indicated that they  
13 have specific evidence that she was singled out because of her  
14 name. Sixth Circuit has said you can have an equal protection  
15 claim if there's direct evidence meaning from the individual  
16 defendant's mouth or something, that person acted because that  
17 person was Arabic, some protected class. There's no such  
18 allegation here of anybody stating that from law enforcement.  
19 So then we have to touch upon the disparate treatment and she  
20 acknowledges in her brief that she can't show that someone  
21 similarly situated was treated differently. So absent that,  
22 plaintiff doesn't have and hasn't pled facts that can support  
23 an equal protection claim. And those are the only comments  
24 that I'll make right now.

25 THE COURT: Okay. Thank you, Mr. Seward. Well,

1 since you have two on your side, I'll ask Ms. Tremont if she  
2 has anything she'd like to say in response?

3 MS. TREMONT: Just very, very briefly on Mr. Seward's  
4 last claim.

5 THE COURT: We'll keep you to that. I mean, what do  
6 you have to say about the similarly situated argument?

7 MS. TREMONT: Right, so the fact that the words  
8 similarly situated do not appear in the Complaint does not doom  
9 our equal protection claim here. If we did have some sort of  
10 allegation that plaintiff was treated differently than a  
11 similarly situated individual, that would be exactly the type  
12 of conclusory allegation that is not entitled to truth under  
13 Iqbal and in fact in the Rondigo case cited extensively by Ms.  
14 Whitman, exactly that happened. There was an allegation of  
15 being treated differently than a similarly-situated individual  
16 that the Court didn't credit because it's conclusory. The  
17 facts in the Complaint establish that Ms. Hebshi was treated  
18 differently than everybody else on that plane except for the  
19 two individuals who were alleged to be acting suspiciously.  
20 She was the only one that was identified as being with them and  
21 the target of law enforcement action and that is enough to  
22 state a plausible claim of discrimination on these facts.

23 THE COURT: All right. Thank you all very much.  
24 Well, I want to thank you for your detailed briefing that  
25 you've provided the Court on this motion and on the responses

1 as well as your argumentation. All of it is very helpful. I'm  
2 not going to go ahead and issue my ruling now, but I will issue  
3 a written decision that will resolve this and try to do so  
4 expeditiously.

5 Now we have another motion as well and I'm not sure  
6 exactly who's going to be arguing that, but we have this motion  
7 by Frontier Airlines.

8 MR. HAVIS: Your Honor, do we have to switch tables?

9 THE COURT: I suppose you might want to or if you  
10 want to sit there, you can, it doesn't matter. If the  
11 plaintiffs want to stay, they're welcomed to stay. If they, if  
12 they'd elect to leave, it's up to you all. If you want to  
13 stay, you can. Doesn't really matter to me where you sit,  
14 you're going to be at the podium most of the time. All right,  
15 so who will be handling this motion on behalf of Frontier?

16 MR. MAYE: I will, your Honor.

17 THE COURT: And would you place your name on the  
18 record, please?

19 MR. MAYE: Good afternoon, your Honor. Brian Maye  
20 for Frontier Airlines.

21 THE COURT: Okay, Mr. Maye.

22 MR. MAYE: Your Honor, this is our motion to dismiss  
23 the airport defendants' cross-claims against Frontier Airlines.

24 THE COURT: Yes.

25 MR. MAYE: And for convenience sake, your Honor, I'm

1 going to refer to the individual airport defendants as the  
2 airport.

3 THE COURT: Okay.

4 MR. MAYE: Your Honor, the airport and Frontier  
5 entered into an airline operating agreement related to  
6 Frontier's use of the Wayne County Airports. Included in that  
7 agreement was a provision that generally stated that Frontier  
8 agreed to indemnify the airport for claims arising out of  
9 Frontier's use of the airport. The airport has filed a  
10 cross-claim against Frontier claiming that Frontier has  
11 breached its duty under the contract to indemnify and defend  
12 the airports. Frontier's position is that cross-claim or  
13 cross-claims fail on the face of the pleadings because under no  
14 circumstances can those cross-claims prevail because under  
15 Michigan law it is against public policy to indemnify against  
16 intentional misconduct or gross negligence. That's clear under  
17 the law; there's no disputing that.

18 The issue that the airport has focused on is whether  
19 the claims against it are considered intentional conduct and  
20 it's clear from the Complaint that the conduct is intentional,  
21 it must be intentional. These are Constitutional claims  
22 against the airport. They certainly are not claims of  
23 negligence. Court after court has concluded that equal  
24 protection claims, search and seizure claims are based on  
25 intentional conduct and in this case if the conduct were

1 negligent conduct, the airport would be immune so from our  
2 perspective, it's clear that there are no circumstances under  
3 which the airport could prevail on its cross-claims against  
4 Frontier Airlines.

5 THE COURT: Now is this intended to be directed a  
6 motion against both of the claims?

7 MR. MAYE: That's right, your Honor.

8 THE COURT: Okay.

9 MR. MAYE: There's two pending cross-claims against  
10 Frontier.

11 THE COURT: Okay. So if you could address how the  
12 argument applies to both claims?

13 MR. MAYE: They're the same claims, your Honor.  
14 There's a handful of, umm, all the claims asserted against  
15 Frontier in the cross-claims are all claims by employees of the  
16 airport and under the agreement, the airline operating  
17 agreement, the employees of the airport are included in this  
18 indemnity provision so the employees have sought indemnity from  
19 Frontier and it's our position that the employees, the  
20 arguments that I just made apply to the employees.

21 THE COURT: They apply with equal force to both of  
22 the claims?

23 MR. MAYE: That's right, your Honor.

24 THE COURT: Okay.

25 MR. MAYE: And that's all I have, your Honor.

1 THE COURT: Well, what -- isn't it the case that the  
2 indemnification agreement comes into effect if the initial  
3 negligence if you will or the cause for the action is due to  
4 the airline's negligence or not?

5 MR. MAYE: Well, I think that --

6 THE COURT: When you read that agreement, isn't that  
7 what it says, that the --

8 MR. MAYE: Yes, certainly there's the argument that  
9 the claims that are, that come within this indemnity provision  
10 only relates to actions of Frontier and not the action of the  
11 airport, umm, but I, I don't think that we even need to go  
12 there, your Honor, because it's against public policy to  
13 indemnify for intentional misconducts and of gross negligence  
14 and those are the claims that are pending against the airport,  
15 the airport cannot prevail, but I do note your Honor that  
16 nowhere in the agreement does it say that Frontier agrees to  
17 indemnify for intentional misconduct or gross negligence and  
18 further down the road if this motion were to fail, certainly we  
19 would have an opportunity to make arguments that that indemnity  
20 provision does not apply because of the facts of the case, but  
21 at this -- but it's our position that we don't even get there  
22 because under no circumstances can this provision apply.

23 THE COURT: All right, thank you very much. Okay, so  
24 will this be Mr. Havis?

25 MR. HAVIS: Yes. Your Honor, may it please the

1 Court, Alan Havis on behalf of the Wayne County Airport  
2 Authority airport police defendants. Your Honor, what my  
3 clients are seeking here is to get Frontier to stand behind its  
4 call for help and to stand behind its contract. The contract  
5 as you just were discussing would invoke the indemnification by  
6 Frontier, however Frontier says in this particular motion they  
7 don't contest whether it would invoke or not, they're just  
8 saying it can't apply because indemnification clauses are  
9 against public policy when it comes to indemnifying for  
10 intentional misconduct or gross negligence.

11 So the first point I guess that needs to be made is  
12 that there's no allegation in the Complaint with regard to  
13 gross negligence. There's just not and the standard for gross  
14 negligence is set forth in MCL 691.1402 or 1407, sub-paragraph  
15 two which requires a deliberate indifference to whether injury  
16 will result. There's no allegation in the Complaint of gross  
17 negligence. There's no allegation that doesn't use the term  
18 gross negligence that would support a possible cause of action  
19 in gross negligence. It's just not there.

20 With regard to intentional misconduct, that's the, I  
21 guess the crux of this issue is the difference between  
22 purposeful action and intentional tort if you will and the  
23 airport authority defendants submit that there is a difference  
24 and that the actions of each of the defendants was purposeful.  
25 In response to Frontier's call for help, they responded, but

1     there is no specific allegation of intentional tort along the  
2     lines of perhaps, I was trying to analogize in my own head as I  
3     was thinking about what I would say to you, along the lines of  
4     specific-intent crimes versus general-intent crimes. There's  
5     no allegation that the civil rights violations alleged are  
6     anything of an intentional misconduct nature.

7             THE COURT: Well, you can't have a civil rights  
8     violation that's not intentional, can you? I mean, that's what  
9     we just went through the whole previous hearing about was that  
10    whether or not allegations that were made which clearly attempt  
11    to allege intentional violation of civil rights, I mean, that's  
12    the, that was the whole basis of the argument regarding the  
13    question of qualified immunity that if you had nothing but a  
14    mistake, then qualified immunity would obviously protect the  
15    officers, but it's when you have that personal, as the  
16    government's own lawyer put it, the personal violation of  
17    somebody's civil rights by an officer knowing and intentional  
18    and then you have a clearly established Constitutional  
19    argument, I mean, that's a high bar that the plaintiff  
20    certainly claims to have hurdled here and so that's what the  
21    Complaint is about and so why is the Complaint not about  
22    intentional misconduct?

23            MR. HAVIS: Well, the distinction I would make to  
24    your Honor is a situation where an officer responding to a call  
25    from Frontier for help perhaps tazes her after she was

1 handcuffed or something clearly alleged to be beyond the scope  
2 of his duties and I suggest to the Court that there is a  
3 difference between those kind of allegations and the  
4 allegations contained in plaintiff's Complaint here. What we  
5 have from the airport authority officers' point of view is that  
6 they -- the allegations are that they got called by Frontier  
7 and that they responded. They responded by taking her off the  
8 plane, by investigating the matter and detaining her and that  
9 the public policy issue with regard to those particular actions  
10 actually run the other way, that the public policy is to  
11 protect the officers in these cases in these kinds of  
12 situations by affording them governmental immunity if this was  
13 a tort case under Michigan tort law or by affording them  
14 protection under 6 U.S.C., 1404 and by affording them  
15 protection under qualified immunity. The courts want -- the  
16 courts are telling us that we want officers to go do their job  
17 and public policy then would favor the courts -- I'm sorry,  
18 would favor of the police departments to do their job and to do  
19 otherwise, to say well indemnification can't apply because that  
20 will promote bad behavior is just not here in this case because  
21 there is no tazing after he was hand -- after she was  
22 handcuffed or any allegation like that. The allegations in the  
23 Complaint are that they were doing their job.

24 THE COURT: Well, I don't mean to interrupt you that  
25 much. I think I understand your point in that your point being

1     that if you have a, let's say an even more extreme example of  
2     of some sort of invasive procedure or beating somebody up,  
3     something that just looked like it was completely beyond the  
4     pale and way out of proportion to the situation, but isn't it  
5     in terms of the reason for not allowing indemnification of  
6     intentional misconduct simply the fact that the person who's  
7     insured controls the ability to misbehave because they know  
8     that they will not have to pay any damages if they  
9     intentionally commit some sort of tort or some sort of civil  
10    rights violation no matter how egregious it may be? I mean,  
11    isn't that the reason for the public policy against that sort  
12    of insurance?

13           MR. HAVIS: Yeah, I think the law is that first of  
14    all indemnification clause will be enforced as written and as  
15    for purposes of our motion or for Frontier's motion today, they  
16    concede I believe that this indemnification clause would apply  
17    to this situation, but the public policy exception if you will  
18    is that fringe exception where you got a bad actor acting  
19    beyond the scope of their employment and what they do. There's  
20    no allegation that that took place. There's no allegation, I  
21    keep oncoming back to it, that she was tased or, you know,  
22    pistol whipped or whatever, you know, some action by an  
23    individual officer. I think if that were the case, then I  
24    think there would be an argument that hey, we didn't agree to  
25    that.

1           THE COURT: Isn't it a better test to go by whether  
2           or not the Complaint alleges that the act was intentional  
3           rather than how severe it was because by your argument, I would  
4           think the Court would be having to try to develop some sort of  
5           a spectrum of conduct and it would be very hard to know well,  
6           okay, tazing is you can't get insurance for unlawful tazing,  
7           but you can get insurance for unlawful banging their head on  
8           the hood of the car. I mean, how is the Court supposed to know  
9           what you can get insurance for if certain intentional  
10          misconduct is insurable, but other intentional misconduct is  
11          not?

12          MR. HAVIS: The, umm, I guess the question comes down  
13          to intentional conduct, intentionally violating this woman's  
14          civil rights versus purposeful action on behalf of the officers  
15          and Frontier. Frontier acted purposefully to give a call to  
16          the federal authorities and the airport police and the airport  
17          police acted purposefully to respond to that call because they  
18          have an obligation to do so. I don't believe that's the type  
19          of public policy that works against the police officers. I  
20          think that's the public policy, the public policy in that  
21          scenario is that we're going to protect the police officers in  
22          that, we want to promote that activity. It would be a  
23          different situation if the officers did something outside of  
24          responding to the call, but what they're accused of here is  
25          responding to the call and taking action and that I believe is

1 purposeful, but I don't believe it's intentional, an  
2 intentional tort of the kind that public policy says is,  
3 excepts the implication of the indemnification clause and  
4 specifically on that point, we cited, you know, what does the  
5 Court use to determine what public policy is and there is the  
6 Mayberry versus Madison case that says you can't just figure it  
7 out --

8 THE COURT: Did you say Marbury v. Madison?

9 MR. HAVIS: I'm sorry?

10 THE COURT: Never mind, go ahead.

11 MR. HAVIS: You can't just pull it out of thin air  
12 what you believe public policy to be. Public policy needs to  
13 be stated in the case law and I don't believe it is in this  
14 regard. Thank you.

15 THE COURT: All right, thank you very much,  
16 Mr. Havis. Mr. Maye, would you like to respond?

17 MR. MAYE: Just quickly, your Honor. One, regarding  
18 Mr. Havis' contention that the intentional conduct was not so  
19 bad and characterizing it as innocuous. I would say that  
20 plaintiff would have a different view on the allegations and I  
21 don't think there's a distinction between intentional conduct  
22 that is not so bad and intentional conduct that is bad. The  
23 fact is the allegations are that the airport committed  
24 intentional misconduct that violated the Constitution.  
25 Plaintiff did not allege negligence.

1           Regarding the public policy question, that's not a  
2 question. Michigan law is clear that it's against public  
3 policy to indemnify for intentional misconduct. That's --  
4 there's no dispute over that.

5           Regarding the remaining arguments by the airport, the  
6 airport's essentially argue the qualified immunity issue and  
7 they're also presenting arguments to be made against, umm, in  
8 defense of the claims against the airport by the plaintiff.  
9 This has nothing to do with whether the indemnity provision  
10 applies and we cert -- and Frontier certainly doesn't suggest  
11 that the provision even without this public policy rule applies  
12 in this case, but that is irrelevant at this stage. At this  
13 stage, we argue that regardless of the facts, the facts,  
14 assuming all facts are true in the Complaint, there cannot be  
15 indemnification because public policy doesn't permit it. Thank  
16 you, your Honor.

17           THE COURT: All right, thank you very much, Mr. Maye  
18 and thank you, Mr. Havis. Again as I told the other counsel, I  
19 appreciate your thoroughness and your briefing. Sometimes  
20 frankly it's not a pleasure to read briefs, but in you guy's  
21 case, you all did a good job. It was very informative and  
22 helpful to the Court and so I'm going to take this motion under  
23 advisement as well. I will issue a written opinion that  
24 resolves the issue presented by the motion. Okay.

25           Now before we go, does anybody have anything else

1 that they need to bring up, that they want to bring to the  
2 attention of the Court regarding this case? You don't have  
3 the -- we don't have the U.S. government with us anymore,  
4 correct? Counsel for the United States is not present.

5 MR. MAYE: I'm sure there's some curiosity across the  
6 parties regarding the motions to stay discovery.

7 THE COURT: Right, okay. On the motions to stay  
8 discovery, those are directly related to the motions for, that  
9 relate to qualified immunity and so the way I would like to  
10 deal with that is just to address that motion as quickly as  
11 possible and then that will show us which way to go with  
12 respect to the discovery motions, all right? Does that sound  
13 acceptable?

14 MR. SEWARD: Your Honor, I have a question.

15 THE COURT: Yes?

16 MR. SEWARD: Because -- Joe Seward on behalf my Wayne  
17 County defendants. We filed a subsequent qualified immunity  
18 argument as to the Fourth Amendment so --

19 THE COURT: Yes.

20 MR. SEWARD: -- do I take the Court to say that he's,  
21 that the Court's going to address not only the equal protection  
22 and the Fourth Amendment claims before ruling on the stay  
23 discovery issues?

24 THE COURT: Yes. I would like to do that and I'm  
25 going to take a closer look at that. I'm assuming, I don't

1 know whether you feel that you would necessarily want to have  
2 oral argument on that motion or not because we have had, you  
3 know, an opportunity to address the equal protection today and  
4 the Court could resolve that based on the briefs which I'd be  
5 glad to do.

6 MR. SEWARD: I always find it helpful if the Court  
7 has questions to be able to try to address them orally, umm --

8 THE COURT: I'll take a look at those briefs and make  
9 a decision as to whether or not to have oral argument, but if  
10 we did so it would delay the issue regarding the whole matter  
11 of discovery.

12 MR. SEWARD: I understand. Thank you.

13 THE COURT: All right thank all.

14 MR. MAYE: I'm sorry, your Honor. Just for your  
15 edification purposes I had my office e-mail me regarding your  
16 questions about the timing of things?

17 THE COURT: Okay.

18 MR. MAYE: Initially the captain sent a message to  
19 Frontier's dispatch at 2:12 p.m. notifying dispatch that there  
20 were two males engaging in suspicious behavior.

21 THE COURT: So that was from the aircraft to  
22 Frontier?

23 MR. MAYE: That's correct, your Honor. Then at 2:24,  
24 Mr. Fraley sent an e-mail to a limited number of people within  
25 Frontier providing the names of the two suspicious men, their

1 seat assignments and then Ms. Hebshi's seat assignment, her  
2 name and the comment she may be with them. At some point  
3 thereafter, a Frontier employee handed that e-mail to a TSA  
4 agent and I think that happened at the gate before the plane  
5 had arrived and then the plane arrived at 3:30 p.m.

6 THE COURT: So you don't have and I don't mean to  
7 suggest you should have it, but as it is right now you don't  
8 have an electronic communication forwarding the 2:24 e-mail to  
9 anyone in law enforcement, you're just saying that was  
10 physically handed to someone, but you don't know exactly when  
11 it was handed?

12 MR. MAYE: That was hand -- that happened at the gate  
13 and TSA supervisor asked the station manager of Frontier if she  
14 had any additional information and she said yes, we have this  
15 e-mail and she handed the, a printed copy of the e-mail.

16 THE COURT: At the gate. By that you mean after the  
17 plane landed or?

18 MR. MAYE: Before the aircraft landed.

19 THE COURT: Before the plane landed, okay. So some  
20 time between 2:24 and 3:30, the copy of the e-mail was given to  
21 TSA?

22 MR. MAYE: That's correct, your Honor.

23 THE COURT: Okay.

24 MR. MAYE: Thank you.

25 THE COURT: Anyone have any questions?

1 MS. HURWITZ: Yes, your Honor. Julie Hurwitz on  
2 behalf of the plaintiff. What just transpired between Mr. Maye  
3 and the Court is a perfect example of why this is all  
4 information we have not been provided with yet so the stay on  
5 discovery is of some significance to us and so it's, we're a  
6 little perplexed by putting the motion to stay on hold pending  
7 the decision by the Court of both dispositive motions because  
8 once the Court rules on the dispositive motions, the motion to  
9 stay is essentially moot, we're either going to go forward or  
10 we're not, so I guess the plaintiffs would request that the  
11 motion to stay be disposed of sooner rather than later if  
12 that's at all possible. I'm -- is that --

13 THE COURT: Yes --

14 MS. HURWITZ: -- is that clear?

15 THE COURT: Well --

16 MR. MAYE: For clarification, your Honor, I'm sorry.  
17 This information, the plaintiff does have because it came from  
18 the Wayne County Airport Authority in the FOIA requests. The  
19 Fraley e-mail had the time stamped on the e-mail and the flight  
20 that's, we all know when the flight arrived.

21 MS. TREMONT: Yeah and sometimes your Honor what  
22 matters at this stage is what's alleged in the Complaint,  
23 right? So I mean these additional facts may be helpful to us  
24 in proving our claims.

25 MR. MAYE: I just provided that to the Court because

1 the Court was asking earlier and I wanted to accommodate the  
2 Court.

3 THE COURT: Okay. Well, thank you very much, Ms.  
4 Hurwitz. I will definitely take that point under advisement  
5 and be looking at the discovery motions along with the other  
6 motions keeping in mind that you have a concern for moving  
7 forward with the discovery as soon as possible.

8 MS. HURWITZ: We do your Honor and along just for the  
9 record, as to the Fourth Amendment motion, if, if we can do  
10 this expeditiously, we also believe that oral argument could be  
11 helpful to the Court.

12 THE COURT: All right, thank you very much. We can  
13 be in recess then.

14 THE CLERK OF THE COURT: All rise. Court's in  
15 recess.

16 (Motions concluded at 4:56 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court  
Reporter, do hereby certify that the foregoing pages  
comprise a true and accurate transcript of the  
proceedings taken by me in this matter on Monday,  
February 10th, 2014.

2/18/2014

Date

/s/ David B. Yarbrough

David B. Yarbrough, CSR, FCRR  
600 Church Street  
Flint, MI 48502